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Supreme Court of the United States

OCTOBER TERM 19.....

PAULINE A. SELSER, ET AL, PETITIONERS,

V.

CITY OF STUART, ET AL, RESPONDENTS.

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

~~PETITION FOR WRIT OF CERTIORARI~~

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It is gravely doubtful that the petition was filed in time. The judgment of the Circuit Court of Appeals was filed April 29th. (Tr. p. 40) Order denying rehearing was filed May 31, 1943. (Tr. p. 45) Petition for certiorari was filed in the Supreme Court September 1, 1943, three months and one day later, contrary to the Statute. (28 USCA 350)

STATEMENT

The several questions presented by petitioner (Pet. pp. 6, 7) are either argumentative or inapplicable. The essential question presented to the Courts below can be stated as follows:

May the Federal Declaratory Judgment Act be availed of to invalidate the charter of a municipality, to exclude territory from its corporate limits and declare void its tax levies?

The question arose out of the following facts:

Three taxpayers of the City of Stuart, Florida, filed in the District Court of the Southern District of Florida, their "Amended Petition for a Declaratory Judgment" seeking a judgment that their property was improperly within the corporate limits of the City of Stuart, and that the legislative acts so incorporating the property in the city were void, and that various tax assessments, levies and tax sales were void. Petitioner joined as respondent a representative of various bondholders and sought to make him, albeit unwillingly, an involuntary class defendant. The prayer of the petition reads like the prayer in an information in quo warranto proceedings to oust a municipality for exercising jurisdiction over lands included therein (R. p. 12)

The District Judge held in effect (Tr. pp. 20-22) that the petition constituted a collateral attack on the existence of a municipality; that the exclusive remedy in such case is by quo warranto proceedings in the State Court (with eventual review by the United States Supreme Court if any constitutional mandate were violated); and moreover, that Federal jurisdiction was denied by the Johnson Act (Act of August 21, 1937, 28 USCA 41 (1)) which prohibited jurisdiction in the District Courts of any suit seeking to "enjoin, suspend or restrain the assessment, levy or collection of any tax imposed by or pursuant to the laws of any State where a plain, speedy and efficient remedy may be had at law or in equity in the Courts of such State."

No better statement of facts and the legal questions involved could be given than that contained in the opinion of the District Judge. (Tr. pp. 21, 22)

The Circuit Court of Appeals of the Fifth Circuit affirmed the decision in the District Court and adopted much of its reasoning. (R. p. 38) (*Selser* v. *City of Stuart,* 135 Fed. (2d) 211)

ARGUMENT

1. The Federal Statutes in various instances forbid enjoining the collection of taxes. For example, Section 3224 R. S. (26 USCA Par. 154) withholds power from the District Court to enjoin collection of any tax by the United States. Likewise, the Johnson Act as amended *supra* denies the District Court jurisdiction to enjoin the assessment or collection of any tax imposed pursuant to State laws where there is an adequate and speedy remedy in the State Courts. Petitioners had a speedy and adequate remedy by quo warranto in the State courts.

2. The legality of including property in a municipality can and should be raised in a public suit—by writ of quo warranto issued upon relation of the State.

> "A suit to restrain Florida city from levying, assessing and attempting to collect taxes on lands, on ground that such lands were not legally part of the city, was a 'collateral attack' upon corporate existence of the city, exclusive remedy for which was quo warranto in the State court and Federal Court had no jurisdiction of such suit." *(Morin* v. *City of Stuart,* 111 Fed. (2d) 773)

The Florida Supreme Court has repeatedly held that quo warranto is available. *(Harrington* v. *City of Pompano,* 188 So. 610, 136 Fla. 730; *City of South Miami* v. *State ex rel Landis,* 192 So. 624, 140 Fla. 740; *City of Winter Haven* v. *Klemm & Son,* 192 So. 646, 141 Fla. 75, and many others therein cited.)

Repeated mention is made by petition of the quo warranto proceedings in the case *State* v. *Stuart,* 120 So. 352. There is no allegation in the petition that any of the petitioners were parties to that suit; nor that it was a class suit; nor that the property of these petitioners described herein was involved in that quo warranto proceeding. If the

facts are as alleged by petitioners, the remedy of quo warranto (the only proper remedy) is available to them.

Just as the Federal Courts have repeatedly held that Section 3224, Revised Statutes, forbids suit to enjoin the Commissioner of Internal Revenue from collection of Federal taxes, so must 28 USCA 41 (1) be held to bar suit to enjoin taxes levied under State laws when an adequate remedy exists in the State Courts.

3. The declaratory judgment statute does not enlarge or recreate jurisdiction, nor was it intended to do so. It is purely remedial and does not add to the content of the jurisdiction of Federal courts.

WHEREFORE, respondents respectfully suggest that the judgments of the Courts below were correct; that the Federal declaratory judgment statute was not applicable; that remedy in this forum is prohibited by the Federal statutes, and that the petition for the writ should be denied.

Respectfully submitted,

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